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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 678

ELLIOTT J. ROSCHUNI and JUNE GILBERT ROSCHUNI,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LEONARD A. LUCE,
933 Munsey Building,
Washington 4, D. C.
Counsel for Petitioners.

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ELLIOTT J. ROSCHUNI and JUNE GILBERT ROSCHUNI,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, by their counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on November 10, 1959 (App. *infra*, p. 13, R. 46), affirming the decision of the Tax Court of the United States entered on July 24, 1958 (App. *infra*, p. 32, R. 28).

OPINIONS BELOW

The Findings of Fact and Opinion of the Tax Court of the United States are reported in 29 T.C. 1193 and may be found in the Appendix, *infra*, p. 13 (R. 6-27).

The opinion of the Court of Appeals, promulgated November 10, 1959 (App., *infra*, p. 12) is reported at 271 F. 2d 267.

JURISDICTION

The judgment of the Court of Appeals was made and entered on November 10, 1959 (App. *infra*, p. 13, R. 46). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether monies advanced on open account by a corporation to one of its stockholders (shown as liabilities of the stockholder on the books of the corporation and repaid in part by the stockholder) constitute dividends taxable to the stockholder under Section 115 of the Internal Revenue Code of 1939.

2. Whether monies withdrawn by a corporate stockholder on open account, without claim of right and with a definite obligation to repay, constitute taxable dividend income to the stockholder under Section 115 of the Internal Revenue Code of 1939.

3. Whether, on account of the offsetting obligation to repay, any gain, taxable as a dividend under Section 115, 1939 Internal Revenue Code, is realized by borrowing on open account.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from • • • dividends • • •.
>
> • • • • •
>
> (26 U.S.C. 1952 ed., Sec. 22.)
>
> SEC. 115. DISTRIBUTIONS BY CORPORATIONS.
>
> (a) *Definition of Dividends.*—The term "dividend" when used in this chapter • • • means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the tax-

able year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made. . . .

. . . . .

(26 U.S.C. 1952 ed., Sec. 115.)

STATEMENT OF THE CASE

The petitioners, Ellioft J. Roschuni and June Gilbert Roschuni are husband and wife who were married March 29, 1947, and reside in Jacksonville, Florida. They filed their joint Federal income tax returns for the taxable years ended December 31, 1947 to 1951, inclusive, with the collector of internal revenue for the district of Florida (R. 8).

The father of petitioner June, Hubert Gilbert, died intestate on April 25, 1945. His heirs-at-law were Ann Gilbert, wife, and June Roschuni, his daughter, both of whom were appointed as administratrices of his estate. (R. 8).

By an agreement dated January 27, 1947, Ann transferred to June all of her interest in the estate in consideration for the sum of $100,000. June Roschuni was appointed sole administratrix by order of the County Judge's Court in and for Duval County, Florida, on January 28, 1947, and served in that capacity until November 15, 1954, when the estate was closed and she was discharged as administratrix (R. 8).

June Gilbert Roschuni maintained a running open account with a corporation known as Gilbert System Hotels, Inc., Jacksonville, Florida, beginning with the year 1945 and during the years 1947 through 1951 here involved (R. 33, 34). From time to time, whenever she made a payment on her account or whenever any monies were due her, June's account on the books of the corpo-

ration was credited with such amount as a repayment on the amount of money due the corporation (R. 33). From time to time June Roschuni borrowed on the open account by drawing thereon (R. 33, 34). Statements were made up from time to time by the corporation showing the charges and credits to the account (R. 33). The petitioners regarded the withdrawals in excess of credits as money borrowed on an open running account (R. 32) and intended to repay the money (R. 33-34). The account was fully set up on the books of the corporation, Gilbert System Hotels, Inc. and the Findings of Fact of the Tax Court shows the charges and credits to the account on the books of the corporation from 1945 through 1951 as follows (R. 13):

Year	Total charges	Total credits	Balance December 31
1945	$ 3,363.36	$ 27.00	$ 3,336.36
1946	22,262.97	3,871.33	21,728.00
1947	181,899.82	[1] 140,816.27	62,811.55
1948	47,778.29	[2] 23,119.89	87,469.95
1949	88,151.33	4,666.21	170,955.07
1950	32,413.75	10,072.04	193,296.78
1951	18,307.40	404.75	[3] 211,199.43

Elliott J. Roschuni also borrowed money from Gilbert System Hotels, Inc. on open account (R. 31).

June Roschuni, as sole heir at law of the Estate of her deceased father, Hubert Gilbert, had the financial stability to justify her intention to repay any monies borrowed (R. 34, 35). The estate owned a majority interest in the stock of nine corporations (R. 9). The 524 shares of stock owned by the Estate in Gilbert System Hotels, Inc. alone had a value of $138.91 a share, or $72,788 (R. 10).

June Roschuni's repayments on the funds advanced to her by the corporation were as follows, year by year (R. 35):

1947	$ 51,792.07
1948	1,244.42
1949	4,646.21
1950	10,024.16
1951	347.51
1952	4.86
1954	79,611.66
A total of	$147,670.95

The repayments of Elliott J. Roschuni were as follows (R. 35):

1951	$ 3,840.80
1952	6,250.00
1953	15,000.00
1954	4,840.36
1955	8,790.06
1956	4,750.00
A total of	$43,471.22

June Gilbert Roschuni was but a very small stockholder in the corporation, Gilbert System Hotels, Inc. During the years here involved she owned and held only 10 shares of common stock in the corporation as compared to 544 shares outstanding (R. 9). During the entire period here involved and until November 15, 1954 when the estate was closed (R. 8), the Estate of Hubert Gilbert, deceased, owned and held 524 shares of the common stock of Gilbert System Hotels, Inc. (R. 9). Ten shares of common stock were held by others (R. 9).

Elliott J. Roschuni owned no stock in Gilbert System Hotels, Inc., either during the years involved or at any time (R. 30, 31).

During the years here involved, 1947 to 1951, inclusive, the corporation, Gilbert System Hotels, Inc. declared no dividend payable to the Estate or to June Gilbert Roschuni or Elliott J. Roschuni.

During the years here involved, the corporation, Gilbert System Hotels, Inc. did not forgive or cancel the

indebtedness or loans of June Gilbert Roschuni or Elliott J. Roschuni. The petitioners continued to make payments on their indebtedness after 1951, the last year involved in this case (R. 35).

The respondent, Commissioner of Internal Revenue, determined that the borrowings or withdrawals made by the petitioner June Roschuni from Gilbert System Hotels, Inc., during each of the years here involved, constituted dividends taxable as such.

The Tax Court held that the withdrawals or borrowings by June Gilbert Roschuni were taxable as dividends under Section 115(a) of the Internal Revenue Code only to the extent of the surplus or earnings and profits of Gilbert System Hotels, Inc. available for the payment of dividends (R. 27). The Tax Court concluded (R. 27):

> "We conclude that the net withdrawals from Hotels, Inc., made by petitioner June during each of the taxable years, constituted distributions equivalent to the payment of dividends but only to the extent that the surplus or earnings and profits of Hotels, Inc. (and that corporation alone), were available for the payment of dividends."

Upon appeal by petitioners, the United States Court of Appeals, Fifth Circuit, on November 10, 1959 rendered a *per curiam* opinion, adopting the opinion of the Tax Court, 29 T.C. 1193, and affirming the judgment of that Court (App., *infra*, p. 1, R. 12). Judgment was entered by the Court of Appeals on November 10, 1959 (App., *infra*, p. 13).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Tax Court adopted and affirmed by the Court of Appeals is not in accord with the principles

enunciated by this Court in determining the essentials for a taxable gain.

It has been established by the decisions of this Court that taxable gain is conditioned upon:

"(1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain. Without some bona fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have received any gain or profit within the reach of Section 22(a)." *North American Oil Consolidated Co.* v. *Burnet*, 286 U.S. 417, 424, 52 S. Ct. 613, 615, 76 L. Ed. 1197. *Commissioner of Internal Revenue* v. *Wilcox*, 327 U.S. 404, 66 S. Ct. 546.

In *Commissioner* v. *Wilcox, supra*, this Court declared:

* * * *

"* * * Nor can taxable income accrue from the mere receipt of property or money which one is obliged to return or repay to the rightful owner, as in the case of a loan or credit. Taxable income may arise, to be sure, from the use or in connection with the use of such property. Thus if the taxpayer uses the property himself so as to secure a gain or profit therefrom, he may be taxable to that extent. And if the unconditional indebtedness is cancelled or retired taxable income may adhere, under certain circumstances, to the taxpayer. But apart from such factors the bare receipt of property or money wholly belonging to another lacks the essential characteristics of a gain or profit within the meaning of Section 22(a)."

* * * *

Here there was no presence of a claim of right to the funds advanced on open account by the corporation to the petitioners and throughout the period involved there was a definite unconditional obligation to repay these monies to the corporation. In fact, there were repay-

ments by June Gilbert Roschuni in the amount of $147,670.95 and $43,471.22 by Elliott J. Roschuni (R. 35).

Both the corporation, Gilbert System Hotels, Inc. and the petitioners recognized the withdrawals as liabilities of the petitioners to the corporation (R. 32, 33, 38). The corporation set up the amounts of the withdrawals on the books as debts on open account. The account of June Gilbert Roschuni was fully set up on the books of the corporation, Gilbert System Hotels, Inc. and the Findings of Fact of the Tax Court shows the charges and credits to the account on the books of the corporation from 1945 through 1951 (R. 13).

Unquestionably, in case of the bankruptcy of the corporation, the petitioners would have been liable to creditors for the payment of the monies due the corporation. *Moses W. Faithoute* v. *Commissioner*, 38 B.T.A. 32, at pages 35 and 36.

The indebtedness of the petitioners to the corporation, as shown by the books of the corporation, was neither cancelled nor forgiven. The petitioners continued to make repayments on their indebtedness after 1951, the last year involved in this case (R. 35).

II.

The decision of the Court below (adopting the opinion of the Tax Court) involves substantial questions of Federal tax law and is in conflict with a number of decisions of other Courts of Appeal.

In *Moses Cohen* v. *Commissioner*, 77 F. 2d 184, the United States Court of Appeals for the Sixth Circuit held that cash withdrawals on open account with a corporation became income to the stockholder for the year when the debt created by the withdrawals was cancelled; not when the monies were withdrawn. The Court pointed

out that the parties recognized the sums withdrawn as liabilities of stockholder to corporation and that the corporation had set them up as a debt on its books. The Court said (77 F. 2d at pages 185-6):

> * * * Moreover, there is evidence that when the sums withdrawn were in excess of the credits, a debt was created. This inference arises from the very nature of a drawing account. * * *"

In *Harry E. Wiese* v. *Commissioner*, 93 F. 2d 921, certiorari denied 304 U.S. 562, rehearing denied 304 U.S. 589, the United States Court of Appeals, Eighth Circuit, affirmed the United States Board of Tax Appeals (35 B.T.A. 701, 704) in concluding that:

> * * * A corporation may lend its funds, including earnings, with or without interest, on open account or upon notes, secured or unsecured; and such privilege is not restricted to the lending of its funds to persons other than stockholders. * * *"

The Court held that the amount of the yearly withdrawals by the stockholder on open account with the corporation constituted a debt due from the stockholder to the corporation and not income at the time of the withdrawal. The Court further held that the amount of the withdrawals constituted income to the stockholder when the debt was cancelled by the corporation.

In *Allen* v. *Commissioner*, 117 F. 2d 364 (CA 1), the Court of Appeals held that the withdrawal of corporate funds on open account with the corporation there involved gave rise to debts and did not constitute income until the year during which the indebtedness was cancelled.

Also in *Boston Consolidated Gas Co.* v. *Commissioner* (CA 1), 128 F. 2d 473, 477, Judge Magruder, in his con-

curring opinion pointed out that no gain is realized by borrowing because of the offsetting obligation to repay.

The same conclusion was reached by the Ninth Circuit in *Wilcox et al.* v. *Commissioner of Internal Revenue*, 148 F. 2d 933, affirmed *Commissioner of Internal Revenue* v. *Wilcox*, 327 U.S. 404, 66 S. Ct. 546, *supra*.

In fact, the Court below, in *McKnight* v. *Commissioner of Internal Revenue*, 127 F. 2d 572, 573, declared:

> "* * * It must be conceded that no gain is realized by borrowing, because of the offsetting obligation. This would be true even though at the time there was no intention to repay. * * *"

We think that the opinion of the Court of Appeals, in affirming and adopting the opinion of the Tax Court is inconsistent with its own decision in *McKnight* v. *Commissioner of Internal Revenue*, *supra*.

A corporation may lend its funds to its stockholders with or without interest, on open account, secured or unsecured. This important principle of Federal tax law has been established by a long series of decisions of the United States Board of Tax Appeals, the Tax Court of the United States and by the United States Courts of Appeal in deciding that loans by a corporation to its stockholders do not constitute dividends taxable as income to the stockholders. *Faitoute* v. *Commissioner*, 38 B.T.A. 35, *supra*; *Rollin C. Reynolds* v. *Commissioner*, 44 B.T.A. 342; *Carl L. White* v. *Commissioner*, 17 T.C. 1562; *Moses Cohen* v. *Commissioner*, 77 F. 2d 184, *supra*, (CA 6), affirming *Moses Cohen* v. *Commissioner*, 28 B.T.A. 190; *Harry E. Wiese* v. *Commissioner*, 35 B.T.A. 701, 704, affirmed 93 F. 2d 921, supra, (CA 8); certiorari denied 304 U.S. 562; rehearing denied 304 U.S. 589.

It is respectfully submitted that the issues herein now before this Court constitute important questions of Federal law which should be finally settled by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

LLEWELLYN A. LUCE,
937 Munsey Building,
Washington 4, D. C.
Counsel for Petitioners.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17779

ELLIOTT J. ROSCHUNI and JUNE GILBERT ROSCHUNI,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Review of Decision of the Tax Court of the United States (District of Florida).

(November 10, 1959.)

Before RIVES, Chief Judge, and TUTTLE and JONES, Circuit Judges.

PER CURIAM: The facts from which this controversy arose and the reasons of the Tax Court for its decision are set forth in its opinion. *Roschuni v. Commissioner*, 29 TaC. 1193. We conclude that the decision of the Tax Court is a correct one and its judgment is

AFFIRMED.

JUDGMENT.

Extract from the Minutes of November 10, 1959.

ELLIOTT J. ROSCHUNI and JUNE GILBERT ROSCHUNI,

No. 17779.

v.

COMMISSIONER OF INTERNAL REVENUE.

This cause came on to be heard on the petition of Elliott J. Roschuni and June Gilbert Roschuni, for review of a decision of the Tax Court of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decision of the Tax Court in this cause be, and the same is hereby, affirmed.

* * * *

29 T. C. No. 127

TAX COURT OF THE UNITED STATES.

Docket No. 58161

ELLIOTT J. ROSCHUNI, and JUNE GILBERT ROSCHUNI,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Filed March 31, 1958.

Held: The amounts received by the petitioner June during the taxable years and claimed by petitioners to be loans from Gilbert System Hotels Inc., consti-

tuted distributions of earnings and profits under section 115, I.R.C. 1939, of that corporation alone, but only to the extent of that corporation's earnings and profits available for the payment of dividends.

Held: The statute of limitations is not a bar to assessment of deficiencies for the taxable years 1947 and 1948, since the petitioners omitted at least 25 per cent of their gross income for each of those years. Section 275 (c), I.R.C. 1939.

Joseph Hartman, Esq., and *Llewellyn A. Luce, Esq.*, for the petitioners.

W. Preston White, Jr., Esq., for the respondent.

The respondent determined deficiencies in income tax against the petitioners as follows:

1947	$21,399.64
1948	7,015.90
1949	39,082.19
1950	6,782.02
1951	16,148.70

Those parts of the deficiencies here in issue result directly or indirectly from respondent's determination that "the amounts * * * withdrawn by you from Gilbert System Hotels, Inc. during [the taxable years] constitute dividends paid from the combined surplus of the Gilbert chain of corporations * * *." The amounts so determined to have been dividends were as follows:

1947	$41,083.55
1948	24,658.40
1949	83,485.12
1950	22,341.71
1951	38,531.77

FINDINGS OF FACT.

Some of the facts are stipulated. The stipulation and the exhibits annexed thereto are incorporated herein by this reference.

The petitioners Elliott J. Roschuni and June Gilbert Roschuni are husband and wife who were married March 29, 1947, and reside in Jacksonville, Florida. They filed their joint Federal income tax returns for the taxable years ended December 31, 1947 to 1951, inclusive, with the collector of internal revenue for the district of Florida.

The father of petitioner June, Hubert Gilbert, hereinafter referred to as the decedent, died intestate on April 25, 1945. His heirs-at-law were Ann Gilbert, wife, and June, both of whom were appointed as administratrices of his estate, hereinafter called the estate, by the County Judge's Court for Duval County, Florida, on June 30, 1945. They acted as such until January 27, 1947. Ann Gilbert by a later marriage became Ann Gilbert Moody.

By an agreement dated January 27, 1947, Ann transferred to June all of her interest in the estate in consideration for the sum of $100,000. As a result of this agreement, Ann resigned as administratrix of the estate, her resignation was accepted, and June was appointed sole administratrix by order of the County Judge's Court in and for Duval County, Florida, on January 28, 1947, and served in that capacity until November 15, 1954, when the estate was closed and she was discharged as administratrix.

During the years ended December 31, 1947 to 1951, inclusive, stock in the hereinafter-named corporations was owned as follows:

	No. of shares owned by Estate of H. Gilbert	No. of shares owned by June G. Roschuni	No. of shares owned by others	Total No. of shares outstanding
Gilbert System Hotels, Inc.—Common	524	10	10	544
Gilbert System Hotels, Inc.—Preferred	170		[1]130	300
Gilbert Hotel No. 2, Inc.—Common	99	1		100
Gilbert Hotel System of Daytona, Inc.—Common	30	10	[2]10	50
Gilbert Hotel No. 6, Inc.—Common	34		[2]66	100
Gilbert Hotel No. 10, Inc.—Common	39	1	[2]60	100
Gilbert Hotel No. 26, Inc.—Common	10			10
552 West Peachtree Apartment Hotel, Inc.—Common	100			100
Gilbert Hotel No. 37,, Inc.—Common	40			40
Osceola Mortgage & Investment Co., Inc.—Common	250	20	[3]20	290
Osceola Mortgage & Investment Co., Inc.—Preferred	500			500
Total	1,796	42	296	2,134

[1] Owned by seven individuals not related to the Gilberts.
[2] Owned by Gilbert System Hotels, Inc.
[3] Owned by June's half-sister.

The respondent recognized that the above-listed 524 shares of the common stock of Gilbert System Hotels, Inc., hereinafter called Hotels, Inc., constituted an asset of the estate, and it was agreed for the purposes of Federal estate and other taxes that the value of his stock at the date of the decedent's death was $138.91 a share.

Hotels, Inc., located in Jacksonville, Florida, was a managing company acting on behalf of the above-listed separate corporations, most of which owned, or leased, and operated hotels. The executives of Hotels, Inc., were also the executive officers of the other Gilbert corporations. A separate set of books was kept for each hotel corporation. The hotel corporations were charged administration fees by Hotels, Inc., for handling all the bookkeeping and for supplies furnished. A separate account was maintained on the books of Hotels, Inc., showing the administrative fees received from each hotel corporation and its other income such as interest. The administrative expenses were also shown in this account. The operating expenses of each hotel corporation were shown on the books kept for that corporation. To recapitulate, each operating hotel corporation had account books maintained in the office of Hotels, Inc., showing income and operating expenses. The necessary information for the keeping of all these accounts was submitted by daily reports to Hotels, Inc.

The managing corporation, by having supervision of all accounts, could readily determine what each hotel corporation was paying out for expenses and what each hotel corporation was earning. This operation through a managing corporation was economical because it rendered unnecessary an individual bookkeeping system by each hotel and permitted a centralized procurement of supplies. The ownership of one hotel by one corporation was advisable because it limited liabilities which might arise as, for example, from a catastrophic fire.

All of the corporations employed a manager, W. W. Walker, Jr. When the decedent died, Walker took over the management of the entire hotel system. In January 1947, W. W. Walker entered into a contract with the several corporations (of which June was president and Walker was secretary) and June, personally and in her capacity as administratrix of the estate, whereby he took over the management of all of the hotels and corporations and became vice president and general manager of Hotels, Inc. The contract was to run from 1947 to 1957. The contract was modified by agreement dated November 8, 1947, and May 9, 1949.

Many difficulties arose under this contract and it was terminated by an agreement dated February 11, 1954. The termination agreement was approved by the county court of Florida which had jurisdiction of the estate.

During the taxable years the books of Hotels, Inc., reflected transactions with Gilbert Hotel No. 2, Inc., Gilbert Hotel No. 6, Inc., Gilbert Hotel No. 10, Inc., Gilbert Hotel No. 26, Inc., Gilbert Hotel No. 37, Inc., 552 West Peachtree Apartment Hotel, Inc., Osceola Mortgage & Investment Co., Inc., and Gilbert Hotel System of Daytona, Inc., as follows:

Year	Total number of transactions	Debits	Credits
1947	677	$179,682.22	$101,661.70
1948	549	77,893.88	71,546.29
1949	528	45,977.20	77,134.77
1950	331	39,156.07	46,677.21
1951	292	44,920.50	44,382.34

The debits shown represent amounts paid for or advanced to the various corporations by Hotels, Inc., while the credit shown represent amounts received by or paid for Hotels, Inc., by the various other corporations.

From 1945 up to and including the time of trial herein June maintained an account with Hotels, Inc. Bills for

her personal expenses were sent to the office of that corporation and, in turn, payments were made directly to her creditors by that corporation and charged by it to her account. In other words, Hotels, Inc., took care of her personal bills and expenses. From time to time she was advised of the status of her account. No notes were given to evidence an obligation to repay this amount, nor was there any security transferred to the corporation. There was no set time or place for repayment and the corporation did not charge any interest on the amounts received by June. There were also charged to this account all of the funds payabe by June to Ann under the agreement of January 27, 1947, all of which were advanced to June by Hotels, Inc. Some personal expenses of her husband, Elliott, were also charged to her account on the books of this corporation at her direction. During the years 1947 to 1950, inclusive, Elliott, who was pursuing his education, had no other source of income except a small salary for part-time work and educational benefits paid by the Federal Government.

June's withdrawals for the years 1945 to 1951, inclusive, were charged on the books of Hotels, Inc., and credits were made as follows:

Year	Total charges	Total credits	Balance December 31
1945	$ 3,363.36	$ 27.00	$ 3,336.36
1946	22,262.97	3,871.33	21,728.00
1947	181,899.82	[1] 140,816.27	62,811.55
1948	47,778.29	[2] 23,119.89	87,469.95
1949	88,151.33	4,666.21	170,955.07
1950	32,413.75	10,072.04	193,296.78
1951	18,307.40	404.75	[3] 211,199.43

[1] Included in this amount is a credit in the amount of $89,000 to reverse an entry of $100,000 for stock entered on the books at one time.

[2] Included in this amount is a credit in the amount of $21,747.27 for dividends from the various corporations which were later reversed out of the account.

[3] Other credits contained in the account were for technical adjustments and correcting entries.

During each of the taxable years ended December 31, 1947 to 1951, inclusive, June received from Hotels, Inc., at least the following net amounts:

1947	$41,083.55
1948	24,658.40
1949	83,485.12
1950	22,341.71
1951	17,902.65

The books of Hotels, Inc., reflected balances in its surplus account as of June 30 of the taxable years and 1952 as follows:

1947	$ 59,921.96
1948	63,968.82
1949	74,650.08
1950	74,931.34
1951	75,706.23
1952	103,569.29

If the withdrawals of June were considered as dividends and had been reflected as such on the books of Hotels, Inc., its surplus account would have shown as available for dividends the following amounts for 1947, 1948, and 1949:

1947	$59,921.96
1948	22,885.27
1949	8,908.13

There would have been no amounts available for the payments of dividends from surplus in 1950 or 1951, since the deficit in the surplus account after 1949 would have been $74,576.99.

In 1950 Hotels, Inc., had a net loss of $364.17 and in 1951 had a net income of $1,088.23.

As of the end of their respective fiscal years ending during the taxable years, Gilbert Hotel No. 2, Inc., Gilbert Hotel No. 6, Inc., Gilbert Hotel No. 10, Inc., Gilbert Hotel No. 26, Inc., Gilbert Hotel No. 37, Inc., 552 West Peachtree Apartment Hotel, Inc., Osceola Mortgage &

Investment Co., Inc., and Gilbert Hotel System of Daytona, Inc., had combined surpluses in the following total amounts:

1947	$109,374.32
1948	131,434.33
1949	174,868.73
1950	201,793.32
1951	213,717.24

During the taxable years ended December 31, 1947 to 1949, June maintained an account with, and made withdrawals from, Gilbert Hotel No. 6, Inc., Gilbert Hotel No. 26, Inc., and Osceola Mortgage & Investment Co., Inc. The circumstances surrounding the withdrawal of these funds were the same as those surrounding the withdrawal of funds from Hotels, Inc. The amounts withdrawn were as follows:

Name	1947	1948	1949
Gilbert Hotel No. 6, Inc.		$6,125.00	$5,713.66
Gilbert Hotel No. 26, Inc.	$2,500.00		
Osceola Mortgage & Investment Co., Inc.	2,625.00		

The credits to the account of June on the books of Hotels, Inc., for the years 1952 to 1956, inclusive, were as follows:

1952	$ 4.86
1953	—
1954	79,611.66
1955	—
1956	—

During the taxable years ended December 31, 1947 to 1950, inclusive, Elliott did not have an account on the books of Hotels, Inc. An account was set up for him during the taxable year ended December 31, 1951, during which he received at least $20,629.19.

The credits to the account of Elliott for the years 1951 to 1956, inclusive, on the books of Hotels, Inc., were as follows:

1951	$ 3,840.80
1952	6,250.00
1953	15,000.00
1954	4,840.36
1955	8,790.06
1956	4,750.00

During the taxable years ended December 31, 1947 to 1951, inclusive, the officers of the nine corporations were as follows:

Name	Office	Years (Inclusive)
June Gilbert Roschuni	President	1947 to 1951
	Treasurer	1947 to 1951
Elliott J. Roschuni	Vice President	1/19/48 to 1951
W. W. Walker, Jr.	Assistant secretary	1/1/47 to 1/28/47
	Secretary	1/28/47 to 1951
	Vice President	1947 to 1951
Arthur Robertson	Assistant secretary	1/28/47 to 1951
Ann Gilbert	Secretary	1/1/47 to 1/28/47

During the taxable years ended December 31, 1947 to 1951, inclusive, the board of directors of the nine corporations consisted of the following:

Name	Years (Inclusive)
June Gilbert Roschuni	1947 to 1951
Elliott J. Roschuni	1/19/48 to 1951
W. W. Walker, Jr.	1947 to 1951
Arthur Robertson	1/28/47 to 1951
Ann Gilbert	1/1/47 to 1/28/47
Maude Gilbert	[1] 1/1/47 to 1/19/48

[1] Only Osceola Mortgage & Investment Co., Inc.

During its fiscal years ended June 30, 1945 to 1952, inclusive, Hotels, Inc., did not declare any formal dividends. During its taxable years ended December 31, 1944 to 1951, inclusive, Gilbert Hotel No. 6, Inc., did not declare any formal dividends. During its taxable years ended December 31, 1944 to 1951, inclusive, Gilbert Hotel No. 37, Inc., did not declare any formal dividends. Dur-

ing its fiscal years ended April 30, 1945 to 1952, inclusive, 552 West Peachtree Apartment Hotel, Inc., did not declare any formal dividends. During its taxable years ended December 31, 1944 to 1951, inclusive, Gilbert Hotel No. 2, Inc., did not declare any formal dividends with the exception of a $4,000 dividend in 1948. During its taxable years ended December 31, 1944 to 1951, inclusive, Gilbert Hotel No. 10, Inc., did not declare any formal dividends with the exception of a $3,000 dividend in 1948. During its fiscal years ended June 30, 1945 to 1952, inclusive, Gilbert Hotel No. 26, Inc., did not declare any formal dividends with the exception of a $2,500 dividend in 1948. During its taxable years ended December 31, 1944 to 1951, inclusive, Osceola Mortgage & Investment Co., Inc., did not declare any formal dividends with the exception of a $6,125 dividend in 1948. During its taxable years ended December 31, 1944 to 1951, inclusive, Gilbert Hotel System of Daytona, Inc., did not declare any formal dividends with the exception of a $3,000 dividend in 1948.

The dividends formally declared by Gilbert Hotel No. 2, Inc., Gilbert Hotel No. 10, Inc., Gilbert Hotel No. 26, Inc., Osceola Mortgage & Investment Co., Inc., and Gilbert Hotel System of Daytona, Inc., in 1948, together with dividends from certain other corporations, were first credited to June's account on the books of Hotels, Inc. An entry was made later, however, whereby this credit was reversed and the amounts were credited to the estate of Hubert Gilbert.

The books of Hotels, Inc., show dividends to the estate as of April 30, 1948, as follows:

Gilbert Hotel No. 10, Inc.	$ 966.18
Gilbert Hotel System of Daytona, Inc.	544.45
552 West Peachtree Apartment Hotel, Inc.	115.03
Gilbert Hotel No. 2, Inc.	6,114.20
Gilbert Hotel No. 37, Inc.	4,123.51
Gilbert Hotel System of Daytona, Inc.	2,400.00
Osceola Mortgage & Investment Co., Inc.	3,250.00

By a deed dated May 1, 1954, June transferred her personal residence to Hotels, Inc. At the same time her husband, Elliott, leased the house back from the corporation at a rental of $550 per month. By virtue of this transaction, her account on the books of Hotels, Inc., was credited in the amount of $70,884.65, which was included in the $79,611.66 figure for the year 1954. This transaction occurred after the respondent's examining officer had contacted the petitioners with respect to this case. The respondent's examining officer first contacted petitioners in 1952.

On their joint Federal income tax returns for the taxable years ended December 31, 1947 to 1951, inclusive, the petitioners reported gross income as follows:

Income	1947	1948	1949	1950	1951
Salary:					
Gilbert System Hotels, Inc.	$6,000.12	$4,800.12	$8,030.87	$9,810.72	$10,015.04
Osceola Mortgage & Investment Co., Inc.		1,200.00			
Gilbert Hotel No. 2, Inc.					200.00
Interest	50.82		27.50	138.50	738.24
	$6,050.94	$6,000.12	$8,058.37	$9,949.22	$10,953.28

On November 4, 1952, a consent extending the period for the assessment of Federal income tax for the taxable year 1947 to June 30, 1954, was executed by the petitioners. This consent was renewed by the parties on January 7, 1954, and the time for the assessment of Federal income tax was extended to June 30, 1955.

A consent extending until June 30, 1955, the period for the assessment of income taxes for the taxable year 1948 was executed by the parties on January 7, 1954.

The statutory notice of deficiency herein was mailed to petitioners on March 9, 1955.

The net amount of the withdrawals by petitioner June from Hotels, Inc., during the taxable years constituted distributions equivalent to the payment of dividends to the extent that Hotels, Inc., had earnings and profits available for the payment of dividends during each of said years.

OPINION.

KERN, *Judge*: The principal issue for our decision is whether certain amounts received by the petitioners from Hotels, Inc., during the taxable years ended December 31, 1947 to 1951, inclusive, constituted distributions equivalent to the payment of dividends within the meaning of section 115 (a), Internal Revenue Code of 1939, as respondent has determined, or, as petitioners contend, were loans to petitioners from the corporation. The respondent's argument as to this question is adequately summarized in his brief as follows:

> The respondent contends that the withdrawals from the hotel corporations by petitioner and her husband were distributions of earnings or profits of the entire chain of Gilbert hotel corporations and should be taxed as dividends for the following reasons: (1) the corporations were closely held and controlled; (2) no note, no interest, and no security were given to the hotel corporations by petitioners; (3) there was no definite time specified for repayment of the amounts withdrawn; (4) the withdrawals were substantial and for the petitioners' personal expenses; (5) there was no apparent ceiling on the amount that could be withdrawn by the petitioners; (6) the withdrawals were not to meet an unusual, nonrecurring emergency; (7) the constant practice of withdrawing corporate earnings on open account with only negligible repayments over a long period of years indicates an established method of dividend distribution; (8) the hotel corporations had a poor previous dividend record; (9) there was no effort to enforce collection on the part of the hotel corporations; (10) there was no plan

> or tangible means for repayment of the withdrawals by petitioners; (11) there were no large credits to petitioner's account until after she had been contacted by respondent's examining officer; (12) the hotel corporations had large surpluses; (13) the petitioner, who made most of the withdrawals, failed to testify, and (14) logic, as well as the decided cases, support[s] the respondent's determination.

The petitioners argue that the respondent's determination was erroneous and that the withdrawals constituted bona fide loans made by the corporation on open account to June, as it had the right to do, and were recognized as such by both the corporation and the petitioners in that the petitioners intended to repay these advances and did make substantial repayments. Petitioners also argue that the distributions could not be dividends because June was only a minority stockholder in Hotels, Inc., and because the distributions were greatly in excess of that corporation's earnings and profits. Another issue as to whether the assessments of the additional taxes for the taxable years 1947 and 1948 are barred by the statute of limitations will depend on whether and to the extent we sustain the respondent's determination of the deficiencies as to those years. If it develops that there has been a 25 per cent omission of gross income for each of those taxable years, the assessment would not be barred by reason of the provisions of sections 275 (*c*) and 276(*b*) of the Internal Revenue Code of 1939. An additional issue involving the amount of the allowable deduction for medical expenses in the taxable year ended December 31, 1951, will also be dependent on our holding on the principal issue.

Whether withdrawals from a corporation represent loans or taxable distributions depends on all the facts and circumstances surrounding the transactions between the stockholders and the corporation. *Harry E. Wiese*, 35 B.T.A. 701 (1937), affd. 93 F. 2d 921 (C.A. 8, 1938), certiorari denied 304 U.S. 562 (1938), rehearing denied

304 U.S. 589 (1938); *W. T. Wilson*, 10 T.C. 251 (1948). When the withdrawers are in substantial control of the corporation, such control invites a special scrutiny of the situation. *W. T. Wilson, supra; Ben R. Meyer*, 45 B.T.A. 228 (1941).

In our opinion, the evidence indicates that the withdrawals by June in the instant case constituted distributions of corporate earnings and profits equivalent to dividends within the meaning of the statute. Briefly, the record portrays the following situation:

Hotels, Inc., was controlled by June, for, although she only owned outright a small percentage of the common stock of Hotels, Inc. (10 shares), she controlled practically all of the common stock of that corporation by virtue of her position as sole heir and sole administratrix of her father's estate which held 524 shares of the 544 shares outstanding. As to the question of whether June's stock interest in Hotels, Inc., was sufficient to justify the treatment of the withdrawals as dividends, the case of *Ben R. Meyer, supra*, is pertinent. Officially, she was the president, treasurer, and a member of the board of directors of each of the corporations. Her husband became the vice president of these corporations in January 1948. During the taxable years the petitioner June maintained an account with, and made substantial withdrawals from, Hotels, Inc., in order to take care of whatever personal expenses she had incurred. She also withdrew funds necessary for the acquisition of Ann's interests pursuant to the agreement of January 27, 1947. Bills for her expenses were submitted directly to Hotels, Inc., and payments were made directly to her creditors. In no instance were any notes given by June for the amounts received by her, nor was there any understanding with regard to any repayment of these withdrawals. There was no agreement to pay interest on any balance of this account, and no interest was charged on the books of the corporation. No security was given for the repayment of

these withdrawals, and no definite time was set for any repayment of the alleged loans. Over the period of the taxable years, some credits to this account were made. However, the net amount of the withdrawals increased steadily and in considerable amounts. Four of the Gilbert hotel corporations declared dividends in 1948. These were the only dividends declared during the taxable years by any of the corporations, although the surplus of Hotels, Inc., and the combined surpluses of the other corporations were increasing yearly. Originally these dividends were credited to June's accounts in 1948 but, later, entries were made reversing this and crediting the amounts to the estate.

These are factors supporting the respondent's determination that the withdrawals in reality constituted dividends. Petitioners, in arguing that the withdrawals in reality constituted loans rather than dividends, point out as factors favoring their contention that petitioners and Hotels, Inc., recognized these withdrawals as liabilities in that they were set up on the corporation's books as debts on open account, that petitioners intended to repay to the corporation the amounts withdrawn, that substantial repayments were made, that the withdrawals were in no way proportionate to stock ownership, and that the earnings and profits of Hotels, Inc., were not sufficient to justify the treatment of these withdrawals as dividends.

The facts that the books of the corporation reflected these withdrawals in the form of open accounts is not a controlling factor in determining the intentions of the parties or, to be realistic, the intention of June since she controlled the corporation. June did not testify in these proceedings. The testimony of her husband as to her intention, to which no objections was made, is not helpful. We must determine what that intention was by circumstantial evidence. We conclude that during the taxable years June had no intention with regard to the repayment of these withdrawals, that she considered the cor-

poration as hers, and intended to use its available funds as her own financial needs and conveniences dictated.

Insofar as June's financial needs and conveniences permitted, credits were made from time to time to this account, but there appears to have been no deliberate attempt on her part to take affirmative steps toward repayment or indicating an intention of repayment until after the taxable years and after respondent's investigation indicated the tax dangers of the situation. Then petitioners transferred their home to their controlled corporation at a valuation to which they as officers and directors of the corporation agreed, and leased it back for a rental to be paid the corporation, practically all of the common stock of which was to be owned by June within the year. This transaction itself indicates that no plans had been made for the repayment of the withdrawals since June apparently had no cash resources available for this purpose.

In connection with petitioners' contentions relating to intention and repayment, it is interesting to note the differences between June's withdrawals and those of Elliott. Elfiott, who was not a stockholder of Hotels, Inc., but was merely a husband and employee, was permitted to make withdrawals only after he had established his own financial responsibility, his repayments on account were regular and really substantial, and he testified convincingly concerning his own intention of repayment. June was a stockholder and controlled the corporation, there were no limitations upon the extent of her withdrawals, the credits to her account were irregular and were so relatively unsubstantial that the balance of her account reflecting these withdrawals increased from $3,336 to $211,199 in 6 years, and she failed to testify at the trial herein.

The fact that distributions may be in amounts which have no reference to the proportions in which stock is

held is not controlling. *Lincoln Nat. Bank* v. *Burnet*, 63 F. 2d 131 (C.A. D.C., 1933), affirming 23 B.T.A. 1304 (1931); *Roy J. Kinnear*, 36 B.T.A. 153 (1937); *C. W. Murchison*, 32 B.T.A. 32 (1935). In this connection it may be pointed out that the case of *Ben R. Meyer, supra*, is authority for the proposition that the stock held by the estate of June's father, of which she was sole executrix and heir and over which she held practical control and ultimate ownership, may be considered as hers in connection with this question.

This latter case has been cited by respondent in connection with petitioners' argument that the withdrawals cannot be distributions equivalent to the payment of dividends in that, or at least to the extent that, they are in excess of the earnings and profits of Hotels, Inc., available for the payment of dividends. Respondent argues that since the various corporations for which Hotels, Inc., acts as the management corporation are controlled by Hotels, Inc., or the estate of June's father, and since June controls Hotels, Inc., and the estate, it follows that the surplus accounts of these corporations must be considered in determining the amounts available for the payments of dividends by Hotels, Inc. In our opinion, that case is not pertinent and respondent's argument on this question is without merit. Although the circumstances here present are somewhat unusual, we know of no authority which would justify respondent in disregarding the separate corporate identity of the various corporations here involved in determining the earnings and profits, or surplus of Hotels, Inc., available for the payment of dividends, as "dividends" is defined in section 115 (a) of the Internal Revenue Code of 1939.

We conclude that the net withdrawals from Hotels, Inc., made by petitioner June during each of the taxable years, constituted distributions equivalent to the payment of dividends but only to the extent that the surplus or earn-

ings and profits of Hotels, Inc. (and that corporation alone), were available for the payment of dividends.

As we have already pointed out, the remaining issues are both dependent on the result just reached. Because there was an omission of at least 25 per cent of gross income for each of the taxable years 1947 and 1948, the assessment of taxes for those years is not barred by the statute of limitations. The amount of the allowable deduction for medical expenses for the taxable year ended December 31, 1951, will be determined in the recomputations hereinafter to be filed.

Decision will be entered under Rule 50.

DECISION.

TAX COURT OF THE UNITED STATES
Washington

Docket No. 58161

ELLIOTT J. ROSCHUNI, and JUNE GILBERT ROSCHUNI,
Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Pursuant to the determination of this Court as set forth in its Opinion filed March 31, 1958, the respondent filed herein a computation of tax on July 22, 1958, in which the petitioners acquiesced. It appearing that such computation is correct, it is

Ordered and Decided: That there are deficiencies in income tax due from these petitioners for the years 1947 to 1951, inclusive, as follows:

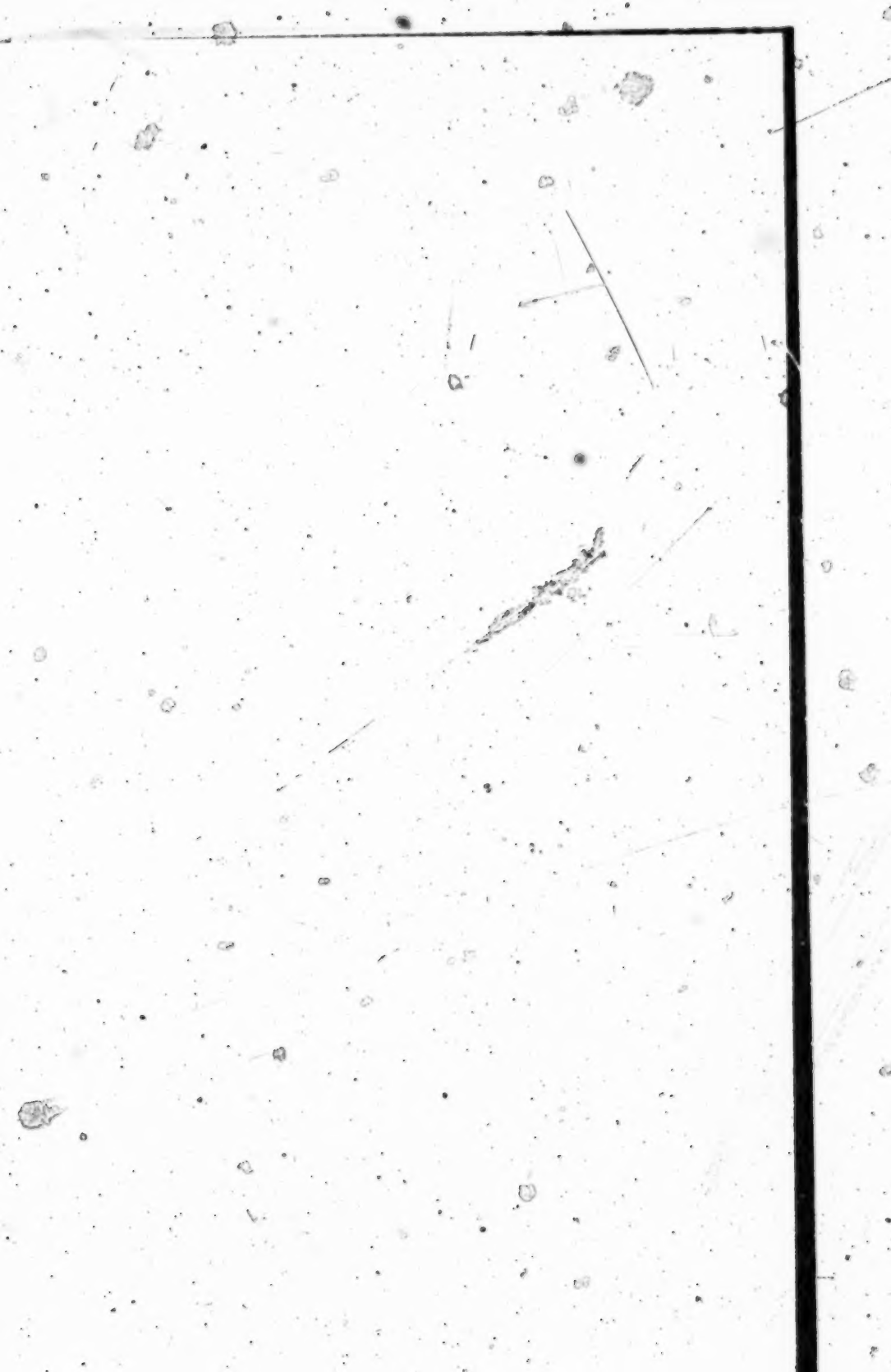
Year	Deficiency
1947	$21,399.64
1948	6,328.88
1949	2,448.46
1950	56.32
1951	250.98

(Signed) JOHN E. MULRONEY.
Judge.

(Seal)

Enter:

Entered Jul. 24, 1958.



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In the Supreme Court of the United States

OCTOBER TERM, 1959

ELLIOTT J. ROSCHUNI AND
JUNE GILBERT ROSCHUNI, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

CHARLES K. RICE,
Assistant Attorney General,

A. F. PRESCOTT,
DAVID O. WALTER,
Attorneys,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 678

ELLIOTT J. ROSCHUNI and
JUNE GILBERT ROSCHUNI, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. 13-31) are reported at 29 T.C. 1193. The *per curiam* opinion of the court of appeals (Pet. 12) is reported at 271 F. 2d 267.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1959 (Pet. 13). The petition for a writ of certiorari was filed on February 5, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a corporation's payment of the personal expenses of its president and 98% stockholder over a period of years during which no formal dividends were declared was properly found, on the facts, to constitute dividends rather than loans.

STATEMENT

Petitioner's[1] father died intestate in April 1945, leaving his wife and petitioner as his heirs-at-law. Petitioner purchased her mother's interest in the estate in January 1947 and was thereafter the sole administratrix of the estate until it was closed in November 1954. The estate owned 524 of the 544 outstanding shares of common stock of the Gilbert System Hotels, Inc.; petitioner owned 10 shares; and the remaining 10 shares were owned by others (Pet. 15-16). During 1947-1951, petitioner was president, treasurer, and a director of Hotels, Inc. (Pet. 22).

From 1945 through the date of the trial, bills for petitioner's personal expenses were sent to and paid by the corporation and charged to petitioner's account. The corporation also furnished, and charged to petitioner's account, the funds payable to petitioner's mother for her interest in the estate. Petitioner's net withdrawals from the corporation (in excess of the credits to her account) for the years 1947-1951 were (Pet. 20):

---

[1] June Gilbert Roschuni will be referred to as the sole petitioner. Elliott J. Roschuni is a party only because he filed joint income tax returns with his wife.

1947	$41,083
1948	24,658
1949	83,485
1950	22,341
1951	17,902

The debit balance in petitioner's account on December 31, 1951, was $211,199. No notes or security were given the corporation to cover the withdrawals; no interest was charged; and no time for repayment was fixed (Pet. 19-20). The corporation declared no dividends during the years 1947-1951 (Pet. 22).

On their joint income tax returns for 1947-1951, petitioner and her husband reported gross income in amounts between $6,000 and $11,000, consisting almost entirely of salary paid by Hotels, Inc. (Pet. 24). Petitioner's withdrawals from the corporation were not reported as income.

In deficiency proceedings, the Tax Court found that "during the taxable years June had no intention with regard to the repayment of these withdrawals, that she considered the corporation as hers, and intended to use its available funds as her own financial needs and conveniences dictated" (Pet. 28-29) and held that the net withdrawals constituted taxable dividends under § 115(a) of the Internal Revenue Code of 1939 (Pet. 2-3) to the extent of the available earnings and profits (Pet. 30-31). The court of appeals affirmed *per curiam* (Pet. 12).

ARGUMENT

The finding of both courts below that petitioner's withdrawals were dividends and not loans is fully supported. Through her father's estate, of which

she was the sole heir and sole administratrix, petitioner controlled, and had the complete beneficial interest in, over 98% of the corporation's stock. She was also president, treasurer, and a director of the corporation. By virtue of her complete control of the corporation, she was able to, and did, draw upon the corporation's assets at will to satisfy her personal needs and convenience. The withdrawals were substantial and continued over a long period of time. No notes were given; no interest was charged; and petitioner's repayments were sporadic and insubstantial. There was no evidence of substance of any intent or plan to repay the withdrawals, and there was no agreement between petitioner and the corporation specifying the time or method of repayment. Petitioner had no resources other than her stock and personal residence[2] with which to repay the corporation. During the period of the withdrawals, which exceeded the earnings and profits of the corporation, the corporation declared no formal dividends. In effect, petitioner, while in form foregoing formal dividends, treated the earnings and profits of the corporation as her own and drew upon them at will to meet her personal living expenses. The courts below correctly concluded that, to the extent that they were out of earnings and profits, the withdrawals were in substance and effect dividends rather than loans.

---

[2] In May 1954, after the investigation of this case had begun, petitioner deeded the residence to the corporation, for which her account was credited in the amount of $70,884. The corporation at the same time leased the house back to petitioner's husband (Pet. 24).

The alleged conflict (Pet. 6-8) with the decisions of this Court in *North American Oil* v. *Burnet*, 286 U.S. 417, 424, and *Commissioner* v. *Wilcox*, 327 U.S. 404, could arise, if at all, only if the advances here were in fact loans, but that is the very factual issue which has been decided adversely to petitioner by both courts below. Similarly, the alleged conflict (Pet. 8-10) with decisions of other courts of appeals merely reflects a difference in factual situations rather than any disagreement in principle, the courts in those cases finding that the advances were in fact loans, a factual finding rejected by both courts here.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

A. F. PRESCOTT,
DAVID O. WALTER,
Attorneys.

May 1960.

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